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NO. 85-1652

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

WAYNE CARL COLEMAN,
CARL J. ISAACS AND
GEORGE ELDER DUNGEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Statement of the case in the Petition for a Writ of Certiorari is incorporated by reference.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE RULE OF RIDEAU V. LOUISIANA, 373 U.S. 726 (1963) IS NOT IN CONFLICT WITH 28 U.S.C. 2254(d) OR RECENT DECISIONS OF THIS COURT, AND IS NECESSARY IN THE RARE CASES IN WHICH IT IS APPLIED

The rule of Rideau v. Louisiana, 373 U.S. 726 (1963) is that in extreme cases, a reviewing court may find that a change of venue is mandated by due process without first examining a transcript of the jury selection. As noted in the Court below, this method of analysis has rarely resulted in the reversal of convictions. Coleman v. Kemp, 778 F2d 1487, 1490, (11th Cir. 1985).

The Rideau rule is necessary because it provides a workable method of analysis in the unique circumstances in which it has been employed. In Rideau, the televised confession of the defendant was viewed by three trial jurors. Despite their exposure to this clearly prejudicial telecast the jurors in question were seated, having been found by the trial court to be sufficiently impartial. The Rideau majority recognized that because this was a unique and extreme situation the voir dire transcript did not reflect the prejudice which resided in the community.

In urging the continued vitality of the Rideau principle it is not necessary to suggest that the jurors in Rideau or in the cases sub judice lied when they stated they could be impartial. In rare cases the legal system requires too much of a juror when that juror is asked to ignore prejudicial publicity which has inundated his community and aroused the passion of himself and his neighbors. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often it father." Irvin v. Dowd, 366 U.S. 717, 728 (1961).

The Petitioner has charged that the circuit court ignored the "presumption of correctness" mandated by 28 U.S.C. 2254(d). Critical exhibits and testimony were available for the first time in the Federal District Court and were not considered by the State fact-finders. Coleman v. Zant, 708 F2d 541, 545-548 (11th Cir. 1983).

The Court below did consider the "fairly supported by the record" standard of 28 U.S.C. 2254(d). In fact that court evaluated the "manifest error" standard of Irvin, the "extemely high" Rideau standard, and the "fairly supported by the record" standard of 28 U.S.C. 2254(d) and found that all of them were satisfied. Coleman v. Kemp 778 F2d at 1537-1538. The Court went on to note "If there were no consitutional right to a change of venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity." Coleman v. Kemp 778 F2d at 1538. If the standards mentioned above are in need of clarification then this Court ought to do so in a case where the fine distinctions drawn might change the outcome. The Petitioner asserts that the Court below afforded no consideration to the voir dire proceedings. This is simply not so. Coleman v. Zant 778 F2d at 1541-1543. In the cases sub judice the potential jurors were examined in the presence of each other, educating each juror as to the questions he or she would be asked. This problem was compounded by the requirement that counsel had to elect at the conclusion of the questioning of each juror and announce their decision. Potential jurors thus knew the questions they would be asked and the answers which would likely gain them a seat in the jury box or in the spectators' gallery, whichever they preferred.

In addition, the actual questions asked were conclusory in nature. Rather than asking of jurors exploratory questions about the extent of their exposure and its effect on their view of the case, jurors were asked if they were exposed, and then if so, could

they still be fair. This shallow examination was not one that could be relied upon to refect the exact nature of exposure and the sentiment generated as a result of that exposure.

In the recent case of Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) this Court dealt with the concept of special deference due state court findings of impartiality. In Patton v. Yount the circuit court below had made a specific determination that Rideau was not applicable. Yount v. Patton, 710 F2d 956, 968 (3rd Cir. 1983).

Of equal significance is the difference between the voir dire in Patton v. Yount and that conducted in this case. In Patton v. Yount it took 10 days to seat 14 jurors from a total of 147. In the cases sub judice 3 juries were selected in far less time from a similar total. The jurors in Patton v. Yount were brought into the court room individually for questioning. While this distinction is not controlling, it is not insubstantial. Patton v. Yount, 467 U.S. at _____ n. 10, 104 S.Ct. at 2890 n. 10. Because of the procedural safeguards and the depth of the questioning in Patton v. Yount the state court had a voir dire which was entitled to special deference. That simply is not so in these cases.

The unique and exteme circumstances in the case illustrate the necessity of the Rideau rule. 28 U.S.C. 2254(d) ought never be construed in such a way as to foreclose a Rideau inquiry. The court below did not ignore the standard of 28 U.S.C. 2254(d), it simply held that that high standard had been exceeded in this case. There is no inconsistency between Rideau and the amended Federal habeas corpus statute. The latter can be construed as setting forth a standard for the application of the former.

It cannot be said that Patton v. Yount, which did not purport to construe Rideau mandates that Rideau, should be overruled. The factual difference between Patton v. Yount and the case sub judice illustrate the continuing need for a Rideau inquiry in rare, unique and extreme cases.

The Rideau rule poses no threat to our system of criminal justice because of its rare application. This is so in spite of the increasing number of pretrial publicity cases. Because Rideau can exist in harmony with 28 U.S.C. 2254 and Patton v. Yount, and not significantly impact the criminal justice system, this Court should decline to issue its Writ of Certiorari in this case.

II. BECAUSE THE "TOTALITY OF THE CIRCUMSTANCES" CAN VARY DRAMATICALLY FROM CASE TO CASE AND BECAUSE THE CIRCUIT COURT EXHAUSTIVELY AND ACCURATELY EXAMINED ALL OF THE RELEVANT CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD DENY CERTIORARI.

If one notion can be gleaned from reading the body of "pretrial publicity-venue change" cases it is that what they have in common is their uniqueness. The differences between Rideau v. Louisiana, Shepherd v. Maxwell, 384 U.S. 333 (1966), Murphy v. Florida, 421 U.S. 794 (1975) and this case are so obvious that they need no explication here. Suffice it to say that as soon as this Court sets forth a supposed all encomposing list of factors to be applied in pretrial publicity cases, new cases will arise which do not fit within the previously announced guidelines, but present new circumstances. This is an area of the law which by its very nature ought to be shaped by a case by case analysis which is best done by lower courts. In so doing, courts can assess what factors are present or absent in a particular case, and the extent to which they are relevant bases on the underlying facts of that case.

That is precisely the type of analysis performed by the circuit court below. To suggest, as the Petitioner has, that the circuit court relied solely on an analysis of the "sources and volume of pretrial publicity" (Petition For a Writ of Certiorari p. 18) is to ignore significant portions of their opinion.

The circuit court carefully and completely analyzed the publicity form all of the critical sources, after noting their circulation. This analysis takes the form of a day by day breakdown of each newspaper's coverage, noting the headline, the content, the date of publication, and the location of the article within the newspaper. Where appropriate, the Court noted the very few articles which could be construed as being "favorable" to the Petitioners, and quoted extensively from one. Coleman v. Kemp 778 F2d at 1492. The Court expressed particular concern about articles which contained prejudicial information which could not be admitted at trial. Coleman v. Kemp 778 F2d at 1538.

In addition, the same type of analysis was done on the only avaliable radio broadcast transcripts. The broadcasts were identifed by date, and those which contained no prejudicial infomation were noted.

The court then went on to discuss word of mouth communication. The Petitioner criticizes the use of the "small town syndrome" (Petition For a Writ of Certiorari p. 20) but the powerful role of word of mouth communication in this small town was established by several witnesses. Coleman v. Kemp 778 F2d at 1533-6. Seminole County in 1973 may or may not have been a part of the technological "global community," but the role of word of mouth communication in that community was large, it was clearly illustrated in the record, and the circuit court would have been irresponsible to ignore it, which it did not.

The Court also considered the testimony of journalists who covered the story and who were present in Seminole County during the critical periods, but again, where approriate, the Court noted those whose testimony was favorable to the state. Coleman v. Kemp 778 F2d at 1536.

Having analyzed the volume, content and timing of the publicity, the role of word-of-mouth communication, and the

testimony as to community atmosphere, the Court summarized the other factors upon which it relied. Coleman v. Kemp 778 F2d at 1538-40. It discussed the tiny community's friendship for the victims, inflamatory remarks by the Sheriff and the defendants mother, the statements of attorneys seeking to avoid their appointments in this case, and the hiring of a special prosecutor to secure the death penalty.

The Petitioner has compiled a list of factors (Petition For a Writ of Certiorari p. 19) which he argues were "not properly taken into consideration." But as noted above, the circuit court did discuss the volume, content and timing of each article or available broadcast. It noted appeals for a fair trial by members of the community. Coleman v. Kemp 778 F2d at 1539 n.20. It indicated the sources of the quotes in the stories article by article. The very few containing mitigating factors were even highlighted. The court took into account the timing and content of the stories dealing with Billy Isaacs' testimony. It discussed the rumors of mob violence, and the court specifically discounted one source of that information. Coleman v. Kemp 778 F2d at 1535 n.15. It carefully pointed out the source of every article and noted the circulation of each, including the Atlanta newspapers, Coleman v. Kemp 778 F2d at 1517.

Because of the unique nature of "pretrial publicity" cases, they are best resolved on a case by case basis. All of the relevant circumstances of this case were considered by the circuit court in reaching their decision. The circumstances of this case are so extreme and rare that further explication by this Court would consume its resources while providing very little guidance for future cases.

CONCLUSION

The teaching of Rideau remains vital and necessary in the few cases where it is applied. The decision of the circuit court is an exhaustive study of the relevant factors in this case and illustates the propriety of case by case analysis. Accordingly, this Court should deny the writ of certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Respondent Carl J. Isaacs was served upon counsel of record for Petitioner, Susan V. Boleyn, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA, 30334, by mailing a copy of each to her, at the foregoing address, by first class United States Mail, this 7th day of May, 1986.

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